Supreme Court, U.S.
FILED
04-1089 FEB 8 2005
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No.

In The

SUPREME COURT OF THE UNITED STATES

Sydney A. Rose

v.

Frederick Laskey, as Commissioner of Revenue, Department of Revenue, Commonwealth of Massachusetts

On Petition for Writ Of Certiorari
To The United States Court of Appeals,
1st District

PETITION FOR WRIT OF CERTIORARI

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Questions Presented

1. Whether the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. 12101 *et seq.*, permits an employer to refuse to hire an individual because of his performance of the job will,as a result of his disability , pose a direct threat to others in the workplace. What is a " direct threat and what tests should be used in assessing that threat and whether or not the First Amendment right of free speech takes precedence over the ADA tests.

2. Whether or not the ADA regulations regarding "direct threat" must be considered by the courts. (29 CFR 1630.15)

3. Whether or not the interactive process must be used by the courts in connection with The reasonable accomodation regulation of the ADA. (29 CFR 1630.2 ® and 1630.9)

4. Whether or not the burden of proof of "a direct threat " defense is on the employer or employee. The courts have been divided on this issue.

5. What is the proper standard of review by an Appellate Court of an affirmative defense under the ADA such as " a direct threat". The lower courts seem to be inconsistent on this issue particulary when the plaintiff is pro se.

6. Whether or not plaintiff made a specific request for reasonable accommodation.

TABLE OF AUTHORITIES CITED

1.ADA regulations 29 CFR 1630

2.*Albertson v. Kirkingburg* 9th Cir (1999) Docket No. 98-591

3. *Bragdon v. Abbott,* 118 S. Ct. 2196 (1998)

4.*Board of Regents of State Colleges v. Roth* 92 S.Ct. 2701 (1972)

5.*Calef v. Gillette,* 322 F.3rd,75 (1st Cir. 2003)

6.*Dees V. Austin Travis Cty.Mntl. Health & Mntl. Ret.* 860 F.Supp 1186 (W.D. Tex, 1994)

7. *Den Hartog v. Wasatch Academy,* 129 F.3rd. 1076 (10th Cir. 1997)

8.EEOC Enforcement Guidance on the Americans With Disabilities Act and Psychiatric Disabilities. Notice # 915.002 3-25-1997

9.*Morton v. United Parcel Service,* (9th Cir. 2001) Docket No. 99-17447

10.*Moses v. American Nonwovens,* (11th Cir. 1996) Docket No. 95-6677

11.*Nunes v. Walmart,* (9th Cir. 1999) Docket No. 97- 17147

12.*Rankin v. McPherson,* 483 U.S. 378 (1987)

13.*Rizzo v. Children's World Learning Center Inc.* 84F.3rd.758 (5th cir.1996)

14.*Rizzo v. Children's World Learning Center Inc.* Docket no. 97-50367cvo (revised 5/3/1999)

15.*U.S. v. Dinwiddie,*76 F2d.913 (8th Cir. 1996)

16. *Weixel V. Board of Education,* (2d.Cir U.S. Ct.Appeals) 2002 Docket No. 00-9149, 00-9150

17.*Whitney v. Board of Education* 292 F.2d. 1280 (10th Cir. 1997)

Brief Overview of Case

This is a petition for Writ of Centiorari from the United States Court of Appeals for the First District under a claim of discrimination under the Americans With Disabilities Act of 1990. It is also a claim of free speech rights under the United States Constitution, First amendment.

Petitioner was discharged from his position at The Massachusetts Department of Revenue for allegedly making a threat. Petitioner claims that he is disabled under the ADA, did not make a threat but exercised free speech rights, that the Department of Revenue failed to reasonably accommodate him, and that the Appellate court failed to apply the proper standards of review. This court has jurisdiction because of the ADA claim, constitutional issues and conflicting standards of assessing "direct threat" by circuit courts. The standards for evaluating a " direct threat" under the ADA

are different than those under the First Amendment

of the U.S. Constitution

1.Direct Threat Defense

Petitioner claims that

the First Amendment tests should take precedence over the ADA regulations Plaintiff also believes that the burden of proof of a "direct threat" is on the employer, not the employee and the lower courts seem in conflict on this issue. (Cites: *Rankin v.McPherson* 483 US 378 (1987) and the ADA Regulations 29 CFR 1630.2 r, listing four criteria.) ADA regulation 29 CFR 1630..2 r states that "the determination of "Direct Threat" shall be based upon an individualized assessment of the individuals present ability to safely perform the essential functions of the job, " and goes on to list four factors to be considered. Some courts have applied these factors' *Nunes v. Walmart,* U. S. Court of Appeals, 9th Cir, 1999 and *Bragdon v. Abbott*, 524 US 624, (1988) and some have not' *Calef v. Gillette,* 322 F 3rd 75, (1st.Cir, 2003)

In a 9th circuit decision *Whitney v. Board of Education,* 292 F2d. 1281, (10th Cir. 2002) , the "direct threat" defense was rejected at least as a basis for summary judgment.

In the case of *Bragdon v. Abbott* 524 US 629 (1988) at 649, " the existence or nonexistence of a significant risk must be determined from the standpoint of the person who refuses ...accommodation, and the risk assessment must be based upon medical or other objective evidence." Plaintiff contends that in this case employer made no assessment attempts other than an arbitrary conclusion , medical evidence was available although it was not allowed to be presented because it was received after the discovery period. An extension of time was asked for at the District Court level but denied.

In a freedom of speech case, *Rankin v. Mcpherson*

483 US 378, (1987) at 393, it is stated " the risk that a single, offhand comment directed to only one other worker, will... disrupt the work force,or otherwise undermine the mission...borders on the fanciful....to the extent that full constitutional analysis of the competing interests is required, I generally agree with the Court's opionion." (Justice Powell,concurring) The claim of a free speech violation was asserted by plaintiff in his objection to summary judgment motion at the District Court level .

The question as to whether or not there was acutally a direct threat is in doubt in this case. There was a single comment made over a seventeen year period of successful employment which was overhead by another person, and taken out of context. The tests required under *Bragdon v. Abbott,* were never made , either by the employer or by either court. Any facts beneficial to the plaintiff were not discussed in either the District Court decision or the Appellate Court Decision.

The tests required under ADA regulation 29 CFR 1630 were not made either. It should be noted under *Bragdon v. Abbott,* "that the existence of a risk must be based upon objective,scientific evidence available… and not simply on his good faith belief that a significant risk existed." Regulation 29 CFR 1630.1(b and c) state, " The ADA does not preempt any Federal law , or any state or local law that grants to individuals with disabilities protection greater than or equivalent to that provided by the ADA. It would seem that First Amendment rights would overrule the ADA as to "protected speech."

2. ADA Regulations and " Direct Threat Defense"

The Supreme Court has required an individualized direct threat inquiry; *Nunes v. Walmart,* U.S. 9th Cir. Ct.of Appeals, docket # 97-17147 (1999) citing *Bragdon v. Abbott* 118 S.Ct.2196,2210 (1998). There are specific factors to be considered. For whatever reason in plaintiff's case, the 1st. Circuit did not do this. In objections to summary disposition plaintiff has stated that these tests must be done. In addition, subjective evaluations by the employer are disallowed citing *Bragdon* again. The analysis must include information about the employee's work history and medical status. In the case of *Nunes v. Walmart*, U.S. Ct.Appeals, 9th Cir, 1999, the court used a three-factor test in order to determine whether " Nunes" posed a direct threat. In plaintiff's case, the

First Circuit did not cite any factors,

merely a subjective opinion based upon

a biased Civil Service decision. According to A.D.A.

regulation 29 CFR 1630.2(r) , the following applies:

" The employer should then consider the four factors listed in part 1630:
(1) the duration of the risk
(2) the nature and severity of the potential harm
(3) the likelihood that the potential harm will occur;and
(4) the imminence of the potential harm."

"Such consideration must rely on objective,factual evidence...not on subjective perceptions,irrational fears... Relevant evidence may include input from the individual with the disability,..opinions of doctors, counselors who have expertise in the disability involved and/or direct knowledge of the individual with the disability."

We see no mention of these four factors in this 1st Circuit decision at bar, other circuits have more or less applied these factors." The direct threat risk must be significant...i.e. high probability of substantial harm, a speculative risk or remote risk is insufficient." (29CFR 1630 In this case at bar there is no evidence to indicate that the risk was significant.

REASONABLE ACCOMODATION AND EMPLOYER HARDSHIP
(3)

Regulation 29 CFR 1630.9 states that " it is unlawful for a covered entity not to make reasonable accommodations.... unless such covered entity can demonstrate that the accommodation would pose an undue hardship on the operation of its business. In this case, plaintiff asked twice for accommodation; first a leave of absence was requested, sick leave, and this was ignored; (see appendix, letter from counselor, Maria Naples 1-22-2001 to supervisor)
second, a security screening was requested.
To the second, employer responded claiming that it would cause undue hardship. This response was made not directly to plaintiff but through a motion for dismissal to the courts. This particular response is ludicrous, considering that the Department of Revenue already has a security system in place

With a private security firm manning a security station at the only entrance, and coded passcards required for entry through a turnstile gate. Packages or boxes are searched, so this excuse is almost pretextual. There is a material issue of fact here as to whether the "direct threat" (if it ever existed at all) could be eliminated through reasonable accommodation. *Whitney v. Board of Education* 292 F3rd 1280, (9th cir 2002), at 1286. It should also be noted; that at the time of this incident, the department's private police force, known as " Internal Affairs", had an office on the same floor as the security gate and within fifty feet of it. Plaintiff does not believe this particular request for accommodation to be a hardship or unreasonable. Hand held metal detectors are relatively inexpensive. The reasonable accommodation process is supposed

To be an interactive process; ADA regulation 29 CFR 1630.9 with interpretive guidance and *Gillette v. Calef 322 F3rd* (1stCir, 2003) under dissenting opinion by Judge Bownes, Senior Circuit Judge. In this dissenting opinion Judge Bownes states; …"the purpose of the ADA, which places emphasis on " encouraging the employer to engage in an interactive process with the Individual to determine an effective reasonable accommodation", citing *Grenier 70 F3rd* at 677. Plaintiff contends that in this case there never was an interactive process concerning reasonable accomodation.

In addition at the U.S. District Court level in plaintiff's objection to motion for summary judgement by defendant, plaintiff suggested using paid and unpaid sick leave as a means of accommodation. (Appendix)

In another case *Morton v United Parcel Service,*

U. S. Ct. of Appeals, 9th Cir, docket no.99-17447 (2001) it states that " summary judgment is available only when there is no genuine dispute that the employer has engaged in the interactive process in good faith". In this case at bar, plaintiff contends that there is definitely a dispute. In addition *Morton* holds that "the task of proving the negative...that no reasonable accommodation was available, rests with an offending employer throughout the litigation."

4. Burden of proof- "direct threat defense.

The statute contemplates an "interactive process concerning a "direct threat" that could be eliminated by reasonable accommodations. *Morton v. United Parcel Service* , U.S. Court Of Appeals 9th Cir ,2001 docket no. 99-17447 And *Barnett v. U.S. Air,Inc.* 228 F.3rd 1105 (9th cir. , 2000) citing : " summary judgment is available only where there is no genuine dispute that the employer has engaged in the interactive process in good faith." Plaintiff claims that there is such a dispute and the employer has and did fail to engage in the interactive process in good faith.

Morton holds that " it is the employer's responsibility through participation in the interactive process, to assist in identifying possible accommodations.

A " direct threat defense" is cited in *Bragdon v. Abbott*, 524 U.S. 624 (1998). The risk must be significant and rely on objective evidence and not on a good faith belief that a risk existed. In plaintiffs case we have only a single comment , taken out of context over a seventeen year period of otherwise acceptable job performance, and overheard not by supervisor but by a third party who did not think it serious enough to report until the next day.

The ADA's reasonable accommodation requirement puts the burden on the employer to show that a proposed accommodation will cause undue hardship. *Morton v. United Parcel Service* U.S.Court Of Appeals 9th Cir. 2001. Plaintiff contends that employer has not proven undue

hardship in this case.

As far as the " direct threat" whether it existed or not, plaintiff contends that employer has not made any of the tests required under other circuit decisions, and cites: *Whitney v. Board of Education , 292 F3rd. at 1286* and *Calef v. Gillette* , 322 F3rd. 1st.Circuit 2003. *Den Hartog v. Wasatch Academy* 129 F2d 1076, 10th Cir, 1997, *Nunes v. Walmart* 9th.Cir docket No 97-17147.

Den Hartog follows the ADA regulations in determining a " direct threat" and indicates "the determination that an individual poses a " direct threat " should be based upon an individualized assessment that relies on the most current medical knowledge and/or on the best objective evidence." (at 1090)

Based upon these cases, plaintiff contends that

there is a genuine issue of material fact as to whether or not plaintiff posed a significant risk to the safety of other employees. For whatever reason, the First Circuit has not analyzed the accommodation request, in accordance with the ADA regulation 29 CFR 1630.15, which requires evidence of an undue hardship. This seems to be in conflict with other circuit courts. As per the abovementioned regulation; " an employer cannot simply assert that a needed accommodation will cause it undue hardship...and thereupon be relieved of the duty to provide accommodation." Both the 9th circuit *Nunes v. Walmart*,docket No. 97-17147 and the 5th circuit *Rizzo v. Children's World Learning Center,Inc.*, docket no. 95-50423, (1996)have held that the burden of proof is on the employer, but the 1st. Circuit seems to place it on the employee, hence there is a conflict between circuits.

5. Standards of Review and Pro se

The District Court and the Appellate Court of the first Circuit do not specifically cite Federal Rule of Civil Procedure 12(b)(6), failure to state a claim upon which relief could be granted but plaintiff assumes that this is the case. If this be the case, then the review by the Appellate Court should have been de novo, and this is especially true when dealing with pro se complaints alleging civil rights violations. *Weixel v. Board of Education* . U.S. Court of Appeals, 2d circuit , docket # 00-9149 and 00-9150, (2001). A pro se complaint should not be dismissed unless " it appears beyond doubt that the plaintiff can prove no set of facts in support of their claim. *Weixel v. Board of Education* and in *Weixel v. Board of Education;* it is stated that more liberal standards are afforded pro se litigants. Defendants in plaintiff's case allege

that certain items were not stated in plaintiff's amended complaint. They were not; but they were in answers to defendant's motions for summary judgment. Certain medical evidence was not submitted because it was not available at the time but this was mentioned in responses to interrogatories. Said medical information was later found. As to the ADA limitations on a life activity limited, it is obvious that working is one of them. While not specifically spelled out, the use of sick time and medication tend to indicate that something is being treated. Plaintiff had a major problem with this case in dealing with the summary judgment standards, and this is something that plaintiff had to learn. Any person who is pro se is at a disadvantage over those who are familiar with these standards. If this case ever did reach a

trial status, plaintiff believes that he can easily prove the disability and the life limitations. Pro se litigants need to be aware of the pitfall of a motion for summary judgement. We do know that in this case in regards to the affirmative defense by defendant of a "Direct Threat", that neither the District Court nor the Appellate Court applied any of the tests as indicated in *Bragdon v. Abbott.* Even in the case that defendant cites, *Calef v. Gillette,* there is a very lengthy dissenting statement by the Senior Justice, Bownes correctly indicating the standards to be used for a " direct threat " defense under the ADA. In a pro se case, the plaintiff's allegations … must be read so as to " raise the strongest Arguments they suggest. *Weixel v. Board Of Education (2001 2d Cir)*

Plaintiff contends that the First Circuit seems to be taking a very constricted approach while other circuits are following the ADA Regulations.

6. Whether or not plaintiff made a specific request for accommodation.

The incident that was the cause of this litigation occurred on January 10th,2001 and plaintiff was terminated on March 2d,2001. In the weeks between these dates, plaintiff requested a leave of absence, in a letter dated, January 22d, 2001 to his supervisor. It should be noted that plaintiff was still an employee at this time and not terminated. Requests for reasonable accommodation do not even have to be in writing and the individual may use "plain English" and need not mention The ADA or use the phrase "reasonable accommodation." *EEOC Enforcement Guidance On the Americans With Disabilities Act and Psychiatric Disabilities,* EEOC No. 915.002 3-25-1997, page 21 which also cites *Schmidt v. Safeway,Inc.* 864 F.Supp 991. Another cite would be *Taylor v. Phoenixville*

School Div. U.S. Court of Appeals, (3rd Cir. 1999) No. 98-1273. The request for accommodation in this case at bar was via the letter dated January 22d,2001 from plaintiff's counselor, Maria Naples, RN, CS. This was submitted at the district level in response to request for production of documents by respondent, a copy being provided respondent; this is in addition to the original mailing to plaintiff's supervisor Patrick Hager. The Appellate Court's claim that this was presented for the first time on appeal would appear to be incorrect.

As previously stated, the second request for accommodation was made in plaintiff's objections to summary judgment motions. The letter dated January 22d,2001 is

sufficient to put employer on notice that the employee is requesting reasonable accommodation. *(EEOC Enforcement Guidance cited above,ibid.)* Plaintiff claims that respondent's ignoring of this letter by a health professional is an indication of a genuine dispute as to whether the employer engaged in the interactive process required. There is no evidence in the record to indicate that employer considered any accommodations. Citing *Nunes,* 9th Cir, 1999, " court should consider whether employer could have made reasonable accommodation that would have eliminated or reduced the direct threat of harm." For whatever reason, neither the district court nor the appellate court did

this.*Nunes v. Walmart,* 9th Cir, 1999

docket no. 97-17147

Conclusion and Argument

Plaintiff believes that this is a case of national importance for the following reasons:

1. The First Circuit's handling of " direct Threat defense is in conflict with other circuits in that the ADA factors are not being applied, at least in this case.

2. ' The question of burden of proof as to reasonable accommodation is in conflict between the circuit courts. Is the burden on the employer or the employee? Plaintiff contends that the burden is on the employer.

3. Does the First Amendment right of protected speech over rule the ADA's direct threat definition so that a class of people, namely, those who are disabled, still have 1st.Amendment protection.

4. Interactive process of providing accommodation.

There should be an interactive process, and if "at the end of this process, the employer fails to provide the disabled employee reasonable accommodation, it is liable under the ADA." *Rizzo v. Childrens World Learning Centers,* U.S. Ct.of Appeals, 5th Cir, 1999, docket No. 97-50367cvo. For whatever reason, this interactive process seems to have been overlooked by both the district and appellate courts.In this case at bar, there was no interactive process, defendant moved for summary judgments.

5. Medical evidence:

Plaintiff believes that there is enough medical Evidence in the record to raise an issue of Fact, unfortunately the bulk of the evidence arrived after the discovery date had closed. The fact that it could not be allowed in, indicates

possibly to a jury, that it does exist, and raises a " could prove" issue. In this case at bar, the defendant, Commonwealth of Massachusetts, is the insurer of medical claims, although they are reviewed by an HMO before payment. It would seem that the State is not allowing its own information to be presented. If this case were remanded back to the District Court for trial, the disability could be proven. There is no "direct threat" defense if the employer "could" have made reasonable accommodation. (*Moses v. American Nonwovens,Inc.* Docket no. 95-6677 (11th cir 1996)

APPENDIX

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1.Judgment- U.S. Ct.
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United States Court of Appeals
For the First Circuit

No 03-2168

Sydney A. Rose
Plaintiff-Appellant

v.

FREDERICK LASKEY, as Commissioner of Revenue,Commonwealth of Massachusettts Department of Revenue

Defendant-Appellee

JUDGMENT

Entered : September 29th,2004

This cause came on to be submitted on the briefs and original record on appeal from the United States District Court for the District of Massachusetts.

Upon consideration whereof, it is now here ordered, adjudged and decreed as follows:
The judgment of the district court is affirmed.

By the Court

"ss———————————

Richard Cushing Donovan, Clerk
(cc : Mr. Rose and Mr Berge)

Not for publication in West's Federal Reporter
Citation Limited Pursuant to 1st Cir.Loc R. R32.3

UNITED STATES COURT OF APPEALS
For the First Circuit

No. 03-2168

Sydney A. Rose

Plaintiff-Appellant

v.

FREDERICK LASKEY, as Commissioner of Revenue, Commonwealth of Massachusetts, Department of Revenue

Defendant-Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS
(Hon. Richard G. Stearns, U.S. Circuit Judge)
before
Selya, Circuit Judge
Stahl, Senior Circuit Judge
And Lynch, Circuit Judge
Sydney A. Rose, on brief, pro se
Matthew Q. Berge, Assistant Attorney General, and

Thomas F. Reilly, Attorney General, on brief for the Appellee.

September 29,2004

Per curiam: We affirm the judgment substantially for the reasons enumerated by the district court in its opinion dated July 10,2003, adding only the following comments:

First: We decline to consider the non-record "evidence" proffered by plaintiff on appeal. See. e.g., United States v. Rosario-Peralta, 175 f 3rd 48,56 (1st Cir,1999) (It is elementary that evidence cannot be sumitted for the first time on appeal.") Plaintiff's contention that he was deprived of an adequate opportunity to develop the record below is mistaken. Defendant's summary judgment motion was filed within the time prescribed by the scheduling order, after discovery had closed. And plaintiff neither moved for relief under Fed.R.Civ P. 56(f) nor voiced any such complaint in his summary judgement opposition. (He sought an

Extension to file his opposition only because "he was in the process of moving:; no mention was made of difficulties in obtaining his medical records.) That plaintiff may have been unfamiliar with his evidentiary burden at the summary judgment stage provides no basis for appellate relief. See , e.g. FDIC v Anchor Properties 13 F3rd 27,31, (1st.Cir. 1994) (noting that litigants pro se status does not absolve him from compliance with the federal rules.) We might add that the outcome of this appeal would be the same even if the newly proffered materials were considered.

Second: Plaintiff contends that a genuine issue of material fact remained as to whether a true threat of violence was involved here. Yet he acknowledges making the reference to the Wakefield tragedy at the end of a heated

exchange with his supervisor. Whatever plaitiff's ultimate intention, defendant cannot be faulted for taking this threat at face value. In analogous contexts, courts have not hesitated to reject claims under the Americans With Disabilities Act. See, e.g. Sullivan v. River Valley School Dist. 197 F3rd 804,813 (6th.Cir. 1999) ("threatening other employees disqualifies one from a job.") (citations and internal quotation marks omitted); Chapa v. Adams, 168 f 3rd 1036 1039 (7th Cir. 1999) ("People who threaten to kill their supervisors are not "qualified" for employment even if their threats are hollow") As this court as recently stated: "Put simply The ADA does not require that an employee whose unacceptable behavior threatens the safety of others be retained, even if the behavior stems

from a mental disability. Such an employee is not qualified. Calef v. Gillette Co, 322 F 3rd 75, 87 (1st Cir. 2003) Such a conclusion is dictated here whether plaintiff is viewed as having the burden of showing that he posed no threat to safety in order to establish he was otherwise qualified for the job. See , e.g. i.d at 87 n10; EEOC v. Amego Inc., 110 F 3rd. 135, 142-144 (1st Cir. 1997) or whether defendant is viewed as having the burden of establishing " a direct threat" as an affirmative defense under 42 U.S.C. 12111(3), 12113(B) and 29CFR 1630.2®,1630.15(b)(2), see Hutton v. Elf Atochem N.A.,Inc. , 273 F 3d 884,893 & n.5 (9th Cir 2001). The case on which plaintiff mainly relies in arguing that factual disputes remained, Whitney v. Board of Education of Grand County, 292 F 3d 1280,1286, (10th Cir. 2002) did not involve

threatened violence and is otherwise distinguishable on its facts.

Third: Plaintiff likewise asserts that a trialworthy issue remained as to whether any such threat could be eliminated through reasonable accommodation. Even if such an inquiry were pertinent in this context, but cf. Calef, 322 f 3d. at 87, n.11, it would not avail plaintiff. It was his burden to show, inter alia, that he made a specific request for an accommodation that would have enabled him to perform the essential functions of the job. See e.g., Reed v. LePage Bakeries,Inc., 244 F 3d. 254 259,261 (1st Cir. 2001) Plaintiff mainly points in this regard to a therapist's letter , delivered to defendant after the incident in question (and introduced for the first time on appeal), indicating the he would benefit from a leave of absence of

unspecified length. In Criado v. IBM Corp., 143 F 3d 437, 443-444 (1st Cir. 1998), we did hold that a leave of absence was a reasonable accommodation for an employee suffering from depression. But no threatening behavior was there involved. And unlike in the case at bar, that employee had "offered evidence tending to show that here leave would be temporary and would allow her physician to design an effective treatment program." Id at 444. In turn, the proposal mentioned by plaintiff below – that he be subjected to regular security screening – not only was untimely but was properly rejected as unreasonable. See e.g., Chapa 168F.3rd. at 1039.

Fourth: Plaintiff has also failed to sustain his burden of proof on the two remaining elements of his ADA claim: that he was disabled within the meaning of

the Act; and that he was discharged as a result thereof. See , e. g., Criado, 145 F 3rd at 441. "This Circuit has recognized depression as a mental impairment that may constitute , at least in some circumstances, a disability under federal law. Calero -Cerezo v. U.S. Dept of Justice. 322 F.3d. At 83-86 (discussing this requirement). His main complaint in this regard is about suffering unspecified side-effects from his medication and needing to take sick leave and vacation leave.

By the same token, there is no genuine dispute about the fact that plaintiff was discharged because of his unacceptible behavior rather than because of any mental impairment. See, e.g. id at 87 (noting that employee " whose unacceptible behavior threatens the safety of others" need not be retained "even if the behavior stems from a

mental disability") Hamilton v. Southwestern Bell Tel. Co' 236 F 3rd 1047, 1052 (5th Cir. 1998) ("The cause of Hamilton's discharge was not discrimination based on (his mental impairment) but rather his failure to recognize the acceptible limits of behavior in a workplace environment.") Palmer v. Circuit Court of Cook County, 117 F.3d 351,352 (7th Cir. 1997) (similar)

Fifth: We decline to address plaintiff's First Amendment and due process arguments as they were not properly raised below.

Affirmed.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

SYDNEY A ROSE

V. CIVIL ACTION NO. 01-11985RGS

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF REVENUE

JUDGMENT

STEARNS, DJ. JULY 17,2003

THIS COURT HAVING ALLOWED

DEFENDANT'S MOTION FOR SUMMARY

JUDGMENT ON JULY 10,2003.

IT IS HEREBY ORDERED: JUDGMENT IS

HEREBY ENTERED IN FAVOR OF THE

DEFENDANT, COMMONWEALTH OF

MASSACHUSETTS,DEPARTMENT OF REVENUE.

SO ORDERED.

RICHARD STEARNS
UNITED STATES DISTRICT JUDGE
Ss" ----------
DEPUTY CLERK
UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NUMBER 01-11985-RGS

SYDNEY A. ROSE

V

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF REVENUE

MEMORANDUM AND ORDER ON
DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT

July 10, 2003

STEARNS,D.J.

Plaintiff Sydney Rose brought this suit against the Commonwealth of Massachusetts seeking reinstatement to his position as a Tax Auditor in the Massachusetts Department of Revenue (Department). Rose maintains that he was discharged in violation of the anti-discrimination provisions of the Americans with Disabilities Act, 42 U.S.C. 12102 et seq.,(ADA). To obtain relief under the ADA, a plaintiff must prove three things. "First that he was disabled within the meaning of the Act. Second, that

with or without reasonable accommodation he was able to perform the essential functions of the job. And third, that the employer discharged him in whole or part because of his disability. Katz v. City Metal Co.Inc. 87 F.3rd 26,30 (1st.Cir. 1996)

Rose argues that he was suffering from depression, and that the accompanying stress caused him to make an intemperate remark to a supervisor. According to Rose the Department refused to grant sick leave to permit him to address his condition, and instead unfairly fired him because of his disability. In its motion for summary judgment, the Department challenges two critical elements of Rose's case, whether he has adequately documented his case of disability ,and

whether he is, in fact,capable of performing the essential functions of his job. Depression can constitute an ADA disability, although proving the elements of a mental disability (is not) as easy or as clear cut as (in) cases of physical disability" Criado v. IBM Corp. 145 F 3d. 437,443 (1st.Cir 1998) While Rose offers two bills for psychotherapy servicces that he incurred some seven years prior to the incicent that led to his termination, whether prior treatment ,coupled with a curr nt self-diagnosis of depression ,are adequate as a matter of law to place this element in dispute is not an issue that the court need resolve. Under the ADA, as one might suppose, an employer may raise as an affirmative defense the lack of qualification

of an employee who poses a "direct threat" to the safety of others in the workplace.

42 U.S.C. 12113 (b). See EEOC V. Amego,Inc. 110 F.3d 135,143 (1st Cir. 1997)

In this latter regard, the Department offers the findings of the Civil Service Commission which were entered after a hearing on Rose's appeal of his discharge. The essential findings are as follows:

2. On January 10,2001, the Appellant was observed playing solitaire on his computer during his regular work hours by his supervisor, Patrick J. Hager. Mr. Hager (had warned) the Appellant twice in the past that he should not be playing games on his computer during working hours.

3. On January 10th,2001, Patrick J.Hager sent

an interoffice memorandum to the Appellant stating " if, as you say, you have a medical reason for (playing)solitaire,please put it in writing and I will pass it on to the Director.

4.The Appellant walked over to Mr. Hager's office and (upon entering) told Mr. Hager that he would get him a doctor's note and that he (Hager) could " stick it up his ass" The Appellant told Mr. Hager that he was leaving work for the day. At this time as the Appellant was about to leave Mr.Hagers office the Appellant stated, " Remember what happened in Wakefield."

CONCLUSION

The Respondent argues that the actions and Comments/or threats made by Sydney Rose

When he stated , " don't forget what happened in Wakefield" toward his supervisor and heard by a fellow worker Richard Lunt(were) inappropriate. This comment came about two weeks after the Wakefield incident that received national media attention when Michael McDermott shot and killed seven of his co-workers at his employer's Wakefield office. The respondent also states that prior to this incident the Appellant was verbally warned about playing solitaire on company time.

The Appellant admits to making the statements but claims he was trying to calm Mr. Hager down, I do not find this statement to be credible.

The summary judgmeent standard is familiar. Summary judgment is appropriate when, based

upon the pleadings,affidavits, and depositions, " there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Gaskell v. Harvard Co-op Society, 3 F 3rd 495,497 (1st Cir. 1993) " In this context ,"genuine" means that the evidence is such that a reasonable jury could resolve the point in favor of the nonmoving party." Rodriguez-Pinto v. Tirado-Delgado, 982 F 2d. 34,38 (1st.Cir 1993) To succeed, the moving party must show that there is an absence of evidence to support the nonmoving party's position.Rogers v. Fair, 902 F.2d 140,143 (1st Cir. 1990). If this is accomplished, the burden then "shifts to the nonmoving party to establish the existence of an issue of fact that could affect the outcome of the litigation

and from which a reasonable jury could find for the (nonmoving party)" Id. The nonmovant cannot simply rest upon mere allegations. Id. Instead the nonmoving party "must adduce specific,provable facts which establish that there is a triable issue." Id. "There must be 'sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the evidence is merely colorable or is not significantly probative, summary judgment may be granted." Id. (quoting Anderson v. Liberty Lobby,Inc. 477 U.S. 242, 249-250 (1986)

Rose has failed to produce any admissible Evidence disputing the Commissioner's (1) Findings. He suggests only that if the Department believes that he is prone to

Violence (Rose maintains that he has no criminal record) , it could presumably as an accommodation, require him to submit each morning to a security search before reporting to work. Even if Rose's suggestion could be deemed an accommodation within the meaning of the ADA, it is not a reasonable one. As the ADA affirmative defense makes clear, an employer is entitled , indeed one would think obligated , to deem an employee unqualified Who threatens a supervisor and co workers with death as a result of a disciplinary dispute. Cf. Grenier v. Cynamid Plastics,Inc. 70 f.3d. 667,675 (1st Cir. 1995) (" An employer may reasonably believe that an employee known to have a paranoia about the plant manager is not able to perform his job."

ORDER

For the foregoing reasons, the Department's motions for summary judgment is ALLOWED.

SO ORDERED,

"SS----------
RICHARD G. STEARNS
UNITED STATES DISTRICT JUDGE

Note (1) Rose does not deny having made the threat.He simply disputes whether the threat Was a "true threat" See Watts v. United States, 394 U.S. 705,708 (1969) The argument confuses the affirmative defense under the ADA with the First Amendment speech protections. Rose does not maintain that he was terminated for any legitimate exercise of his First Amendment rights.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

SYDNEY A. ROSE

Plaintiff

v.

COMMONWEALTH OF MASSACHUSETTS DEPARTMENT OF REVENUE

Defendant

OBJECTION TO MOTION FOR SUMMARY JUDGMENT BY DEFENDANTS-

COMMONWEALTH OF MASSACHUSETTS-
DEPARTMENT OF REVENUE

Plaintiff objects to defendant's motion for summary Judgment for the following reasons:

1. Once again defendant is trying to have this case dismissed on technicalities. Defendant cites several arguments as to why this case should be dismissed:

   a. absence of evidence to support the non-moving party's case

   b. sovereign immunity defense

   c. prima facie case of disability

   d . a question of the proper party, the state or its officials.

2. Plaintiff will argue the following:

   a. that there is evidence to support his case

   b. the the sovereign immunity defense does not apply in this case

   c. that there is a prima facie case of disability

d. that the proper party, the state officer, is named

e. that the state has not applied the "direct threat standard" and has not considered the First Amendment Right of Free Speech

f. that the state has not made reasonable accommodation and appears to be in violation of the Health and Medical Leave Act of 1993

g. that the reasons for termination were pretextual and had little to do with a "threat to public safety."

h. the state has attached a Civil Service Decision dated April 22, 2003 but fails to note that a reconsideration was asked for and in the event that this is denied, an appeal asked for

i. if abusive behavior is grounds for termination as defendant seems to indicate then the plaintiff

contends that his supervisor should also be terminated for similar abusive behavior.

3. A memorandum is attached to support this objection to defendant's motion.

Sydney A. Rose, pro se
"ss----------

93 Witchtrot Rd

Sanbornville, NH 03872
(603) 522-6576

Dated: June 21,2003

CERTIFICATE OF SERVICE

I, Sydney A. Rose, pro se, hereby certify that I have This date, June 23,2003 served the foregoing documents upon the attorney of record by mailing a copy first class postage prepaid mail to:
Marini Torres-Benson, Assistant Attorney General
200 Portland St, Boston, MA 02114

Sydney A. Rose, pro se
"ss----------
93 Witchtrot Rd
Sanbornville, NH 03878
(603) 522-6576

UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF MASSACHUSETTS

SYDNEY A. ROSE

Plaintiff

v.

FREDERICK A. LASKEY, AS COMMISSIONER
OF REVENUE,COMMONWEALTH OF
MASSACHUSETTS

Defendant

**MEMORANDUM IN SUPPORT OF PLAINTIFF'S
OBJECTION TO DEFENDANT'S
MOTION FOR SUMMARY JUDGMENT**

This is an action for injunctive relief against the Commissioner of Revenue, Frederick A. Laskey for an improper termination. It is a complaint under The Americans With Disabilities Act for failure to make reasonable accommodation. It could have been a complaint under the Family and Medical Leave Act for failure to pay sick time. We will prove either by evidence or testimony, that the

plaintiff had a disability under the A.D.A., that this disability could be limiting at times, that The Department of Revenue (employer) knew about said disability, that sick time/leave was Requested , and not granted. We will prove either by evidence or testimony that there was no direct threat to safety of employees and that the reason given for termination i.e. " direct threat" was not the real reason, rather a pretextual reason. We will prove either by evidence or testimony that the sovereign immunity rule does not apply here and that a continuing violation occurred.

A. Evidence- Disability

Plaintiff was diagnosed as depressive by Dr. Joel Rubenstein, psychiatrist, Dr. Robert Edlund, Psychologist and Maria Naples, RN, CS, plaintiff

was on medication for depression and stress as far back as 1993. (See 1993 bills, exhibit------)

Depression qualifies as a disability under the A.D.A, Stradley v. LaFourche Communications,Inc., 869 F.Supp 442 at 443, (1994) and a Wall Street Journal article dated 9-11-1995 (Exhibits 2 and 3)

Was the plaintiff a qualified individual? Yes. This is defined as someone who can perform the essential functions of his job with or without reasonable accommodation. (*Stradley v. LaFourche Communications, 862 F.Supp 442 at 444, 1994)*

Was plaintiff able to perform his job with reasonable accommodation? The answer is yes by using paid and unpaid leave as necessary. (*Stradley v.La Fourche At 444)* Mass. Department of Revenue yearly evaluations are evidence that plaintiff could perform his job.

Was plaintiff limited in a major life activity? Yes Because of the side effects of the medications. (*Dees v. Austin Travis Cty.Mental Health & Mntl. Ret. 860 F.Supp 1186 ((W.D.Texas 1994)) at 1189)*

In addtion plaintiff used a considerable amount of sick time due to depression and in many cases, the use of vacation time was actually sick time because plaintiff was reluctant to deal with the department's sick leave policies. Plaintiff will offer evidence or testify to this fact.

Did defendant offer to make any accommodaton? No.

B. <u>"Direct Threat"</u>

Defendant claims that plaintiff posed a "direct threat" that could not be eliminated by reasonable accommodation, and " where the essential functions of the employee's job implicate the

safety of others, the employee must show that she can perform those functions in a way that does not endanger others. Amego 110 F.3rd. 135,144 (1st.Cir) 1997 at 144.

Plaintiff contends that defendant never even considered any way that his job functions could be done in a way that did not endanger others. For example: the Department of Revenue had a security desk at the main and only entrance, plaintiff could have been searched or checked at this point. Plaintiff will contend that this could have been done. Plaintiff's records show no propensity to violence, plaintiff has used only legal proceedings against the employer. Plaintiff does some volunteer work at local hospitals in New Hampshire. Plaintiff contends that this particular defense by defendant is ludicrous and

will testify to that effect and produce witnesses if necessary.

C.Sovereign Immunity and Proper State Officer

For this case, the Commonwealth has accepted plaintiff's contention that job reinstatement is injunctive relief. The proper state officer was named in the Amended Complaint filed with This court dated 10/28/2002. The continuing violations of federal law are a failure to grant sick leave, paid or unpaid, both under the A.D.A. and Family and Medical Leave Act, and a failure to consider the First Amendment Rights of Free Speech.

Prior to being terminated, plaintiff **was** on sick leave albeit for a short time; however management was aware of this, and aware of the reasons for the sick leave. Plaintiff is still waiting for the

sick leave that should have been given.

C. Direct Threat to Safety:

The defendant's have not proven that there is or was a direct threat to public safety. They have not applied any standards at all. In the case of Bragdon v. Abbott, 524 U.S. 624, (1988) it is stated, " the existence or non-existence of a significant risk must be determined from the standpoint of the person who refuses treatment or accommodation and the risk assumed must be based upon medical or other objective evidence." And a also (Id.) "few if any activities in life are risk free, *Arline* and the A.D.A. do not ask whether a risk exists, but Whether it is significant." (School Board of Nassau Cty. V. Arline 480 U.S. 273,287 (1987)

The question as to whether a statement is a threat or protected speech is reflected in U.S. v.Dinwiddie

76 F.3rd 913 (8th cir.) 1996 at 925. Plaintiff will prove by evidence and testimony that the statements made by plaintiff were not "true threats." The following factors should be considered:

1. reaction of recipient
2. whether threat was communicated directly
3. whether statements had been made in the past
4. whether the maker of threat had a propensity to engage in violence

The First Amendment requires a *court* to differentiate between a "true threat" and protected Speech. Watts v. United States, 394 U.S. 705,707 1969 at 708.

D. In a similar case heard before the Massachusetts Civil Service whereby an employee physically assaulted his supervisor, Siam V. Department Of Revenue, 9CSR 76 (1996), said employee only

received a five-day suspension. In addition,said employee threatened a taxpayer.

(See N.A.G.E. closing brief, (appendix li,lii)

E. Plaintiff will introduce either evidence or testimony which will indicate that the state has not made any serious efforts to settle this case. Plaintiff believes that this is a case which should never had ended up in court citing: Dees v. Austin Travis County Mental Health & Mental Et, 860 F.Supp 1186 (W.D.Tex .1994) at 1191 and 1192. Prior to the Civil Service Hearing, the state offered $5,000 and then $7,500 to settle said case,but in view of the plaintiff's salary at the time, (around $70,000 per year), this did not seem to be a serious offer,especially after taxes. It should be noted that plaintiff held the highest Civil Service grade, Tax Auditor III, which he

earned by the fact that he was a C.P.A. at the time,and passed Civil Service Examinations for this grade; it should be also noted that shortly after plaintiff was terminated, an early retirement plan was offered whereby qualified employees were given five years service credit. Plaintiff missed out on this also. One has to wonder why the state was in such a hurry to terminate plaintiff that they started termination proceedings before their Internal Affairs Unit finished their investigation. (Cite: Exerpts of Civil Service Hearing on tape but not mentioned in written decision.) It should also be noted that plaintiff has asked for reconsideration of the Civil Service decision; and in the event that this is denied as it probably will be, intends to appeal said Civil Service decision.

As of this date, there has been no response to plaintiff's request for reconsideration, this may be due to staffing problems at civil service.

F. CONCLUSION:

The proper state official has been named, Frederick A. Laskey, Commissioner of Revenue since he signed the termination letter,acting in his official capacity. The *Direct Threat Defense* is not appropriate for a summary judgment, " insamuch as to whether she actually posed any significant risk...was a question for the factfinder to resolve. Whitney v. Board of Education of Grand County, 10th Cir 6-18-2002, No. 00-0432, 13 Americans With Disabilities Cases 296.

There are a number of Constitutional issues in this case, First Amendment, Fourteenth Amendment And Eleventh Amendment. The *Ex Parte Young*

exception applies here so that " state officials do not employ the Eleventh Amendment as a means of avoiding federal law, is regarded as carving out a necessary exception to Eleventh Amendment immunity." Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc. 506 U.S. 139 (1993) at 146.

Plaintiff strongly requests that the defendant's motion for summary judgment be denied and that the case proceed.

Respectfully submitted,

Sydney A. Rose, pro se
"ss_____"

COMMONWEALTH OF MASSACHUSETTS

Suffolk,ss. Civil Service Commission
Case No. D-01-486

Sydney A. Rose

Appellant

v.

Department of Revenue
Respondent

APPELLANT'S CLOSING BRIEF

Introduction

Sydney Rose, the appellant in this case files this brief to establish that he should be reinstated to his position as Tax Auditor III in the Department of Revenue (DOR). The appellant's conduct in this case was not a threat to anyone in his work place and does not justify termination of his employment.

Argument

I. Appellant's Employment History:

The Appellant in this case was employed by The Department of Revenue for 18 years. He joined the DOR as a Tax Examiner I and

progressed through the ranks to Tax Auditor III by taking and passing civil service examinations. For many years he audited Corporate tax returns. From approximately August 1999 until his termination in 2001, he worked in the Banking & Insurance section of the DOR. The parties stipulated that he received satisfactory or meets ratings on his EPRS from 1995 until his departure from the Agency. There was no evidence that his EPRS ratings had ever been unsatisfactory. On his FY2000 EPRS (Ex 5), the Appellant received an overall "meets" as well as "meets" on all the duties that applied to him. In a general comment,his supervisor wrote, " Syd has does (sic) a diligent job with respect to monitoring his inventory. He inherited many

problem cases upon his assignment to the B & I Group and has judiciously reduced that inventory." This comment reflects a competent and reliable employee.

The Appellant had no history of making threats. There was evidence of one prior disciplinary action, for an improper stock purchase, but no discipline for any sort of violent or threatening behavior. He has no criminal record.

II. The Appellant's Statement Was Not a Threat

This case arose on January 10,2001, when the Appellant was at work in the Banking and Insurance Section of the DOR about 1 pm. His supervisor, Patrick Hager encountered the Appellant playing a solitaire game on his computer. Mr. Hager reprimanded the

Appellant for playing the solitaire game and for failure to respond to a voice mail and an e-mail.

Mr. Hager returned to his cubicle. The Appellant checked his e-mail and listened to the voice-mail again.

The Appellant then went to Mr. Hager's cubicle to discuss the situation. No one else was present. During this discussion, the Appellant told Mr. Hager that he had not received the e-mail at all, and that he had not heard the end of the voice-mail. Mr. Rose also said he needed to play solitaire to deal with his stress and depression. Mr. Hager stated that the Appellant would need to bring in a doctors note to justify the solitaire. The Appellant replied that he would bring the note, but

Mr. Hager could shove it up his ----. The Appellant said he was going home sick. The Appellant also testified that he also said to Mr. Hager , " Don't forget about Wakefield." According to the Appellant, his comment,made after a heated discussion was intended to calm Mr. Hager down. The Appellant testified without contradiction that he made a calming gesture with his hands , palms down, while he made the comment. Mr. Hager who was on the telephone ,calling his supervisor during that portion of the meeting,did not hear the reference to Wakefield. The Appellant left the office signing out sick.

The only person who did hear the reference to Wakefield was a Richard Lunt, another

DOR employee who was in a cubicle adjacent to Mr. Hager's. Mr. Lunt testified that at the time of this incident ,he was typing a letter. He heard the conversation between the Appellant and Mr. Hager. It grew loud at times. He said He heard the Appellant make the comment about Wakefield in a low tone, not loud, but at first , did not understand what the Appellant was talking about. Once he realized the Appellant might be referring to the recent incident in Wakefield, Massachusetts in which an employee allegedly killed seven co-workers. He got up and asked two other individuals nearby If they had heard the comment. Neither of them, a man and a woman , had heard the comment. The Appellant did not create any sense of alarm or distress among the DOR employees, because no

one except Mr. Lunt had heard what the apppellant said. Later in the afternoon, Mr. Lunt went to his own supervisor to report what he had heard. Beyond that, he did nothing else concerning the Wakefield comment on January 10. He went home at the end of the day. Importantly Mr. Lunt said he did not feel there was any threat in the Appellant's comment. No one else could have felt threatened by the comment because no one else heard it.

The next day, Mr. Lunt's bureau chief told him to write a memorandum concerning the incident between the Appellant and Mr. Hager. Not sensing any urgency in the request, at the end of the work day, Mr. Lunt went home, without having written the memo. The bureau chief,one Iris Lee, called him at home and asked him where the memo was.

Ms.Lee said she needed the memo now, because Internal Affairs wants it. Mr. Lunt returned to work that day and wrote the memo.

DOR was apparently determined to act against the Appellant quickly. On January 11, the day after the incident, a notice of contemplation of dismissal from his employment was drafted. On January 12, A deputy sheriff delivered tne letter to the Appellant at his home. DOR's Internal Affairs division did not complete its investigation of the incident until January 24. Internal Affairs never interviewed the Appellant. The Appellant has no history of making threats and had no criminal record. DOR's decision to send out a notice of contemplation of dismissal the day after the incident was precipitate and unjustified.

III.Precedent Does Not Support Termination

Although the commissioner hearing this case referred to a recent decision o f *Perkins v. Stoneham Public Schools* (Case No. D01-493, August 29,2002 as dispositive of this matter, The present case is actually far different. In *Perkins,* the employee had been working for the school department as a custodian for only six months at the time of the incident that led to his dismissal. The Appellant in the present case had worked for DOR for 18 years, been promoted several times and had a long history of satisfactory performance reviews. He passed Civil Service examinations for every position he held at DOR. He had never been disciplined for threatening comments before.

Moreover, the facts of the present case are far

less severe than those in *Perkins*. In a conversation with a fellow employee, Perkins mentioned three other employees who he thought were trying to push him out of a job. He went on to say he would make Wakefield look like a picnic and "People would be going out in body bags." These comments are far more explicit and threatening than the single comment the Appellant in this case made. Perkins made his comments in the context of a discussion of three other named individuals with whom he had reason to be angry. The comments were angry,direct and specific. This is in stark contrast to what occurred in the present case. The present Appellant made his comment in a low voice and did not say anything that suggested violence, such as " People would be going in body bags." The Appellant himself explained that he was

seeking to calm the situation between him and his supervisor. He was trying to help his supervisor understand that employees need to be treated respectfully to prevent incidents like Wakefield from occurring. This is far from the unsupported position of DOR , that the Appellant was a present danger to other employees of the agency.

DOR's own precedent concerning threats also does not support termination. In the case of *Simao v. Department of Revenue,* 9MCSR 76 (1996), DOR imposed a five-day suspension on an employee who grabbed his supervisor around the throat,yelled " I'll throw you out the window" and later yelled at the same supervisor, "There are a lot of people in here that don't like you. You better walk a straight line." After that Mr. Simao demanded from the same supervisor

the name of a taxpayer who had complained about him. The supervisor asked Mr.Simao why he wanted the name. The answer was "Because I want to get him."

The Civil Service Commission upheld the penalty of a five-day suspension. Without doubt, Mr. Simao's conduct was far more egregious than in the present case. Mr. Simao committed a physical assault on his supervisor and shortly thereafter verbally threatened him as well. On top of that Mr. Simao then made a threatening comment concerning a taxpayer who had complained about him. This conduct occurred in three separate incidents. If Mr. Simao's conduct over these three events drew only a five-day suspension,the present Appellant's quiet comment containing no threat and involving no violence should not lead

to termination.

Conclusion:

The Commission should reverse the decision of the respondent to terminate the Appellant and restore the Appellant to his position as a Tax Auditor III with full back pay and benefits.

Respectfully submitted,

Richard E. Waring,Esq.
Counsel
National Association of
Government Employees
159 Burgin Parkway
Quincy,Ma 02169
(617) 376-0220

Dated: 4/11/03

"SS_____
Richard E. Waring

COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION

SUFFOLK,ss

Sydney A. Rose
Appellant D-01-486

v.

Department of Revenue
Respondent

Appellant's Representative: Richard E.Waring,Esq
N.A.G.E.
159 Burgin Pkwy.
Quincy, Ma.02169

Respondent: Kathleen Chaloux, Esq.
Department of Revenue
51 Sleeper St.
Boston, Ma 02208

Commissioner: Daniel J. O'Neil

DECISION

Persuant to the provision of M.G.L. c 31, s43, the Appellant, Sydney Rose is appealing the March 2,2001 decision of the Respondent terminating him from his position as a Tax Auditor III in the

Department of Revenue. A hearing was held On March 12,2003, at the offices of the Civil Service Commission. One tape was made of the hearing.

FINDING OF FACT:

Based on the testimony and five exhibits placed into evidence marked (1 thru 5), I make the following finding of fact.

1. The Appellant, Sydney A. Rose, was an 18 year Employee with the Department of Revenue as a Tax Auditor III.

2. On January 10th ,2001, the Appellant was Obsserved playing solitaire on his computer During regular work hours by his supervisor Patrick J. Hager. Mr. Hager spoke to the Appellant twice in the past that he should not be playing games on his computer during working

hours. (Ex 3)

3. On January 10th,2001, Patrick J.Hager sent an inter-office memorandum, to the Appellant stating " if as you say , you have a medical reason for you to play solitaire, please put it in writing and I will pass it on to the Director, emphasis added (ex 3)

4. The Appellant walked over to Mr. Hager's office and entered, he told Mr. Hager he would get him a doctor's note and that he "Hager" could stick it up his ass." At this time as the Appellant was about to leave Mr.Hager's office, the Appellant stated, " Remember what happened in Wakefield"

5. On January 11th,2001, the Appellant received notice that the Appointing Authority was contemplating terminating his employment with the Department of Revenue and that a hearing was scheduled for January 18th,2001. (Ex 2)

6. Letter dated March 2d,2001, notified the Appellant that as of this date he was terminated from his employment with the Department of Revenue. (Ex. 1)

CONCLUSION:

The Respondent argues that the actions and comments/or threats made by Sydney Rose when he stated " don't forget what happened in Wakefield" towards his supervisor and heard by a fellow worker Richard Lunt was inappropriate This comment came about two weeks after the Wakefield incident that received national media attention when Michael McDermott shot and killed seven of his co-workers at his employer's Wakefield Office. The Respondent also states that prior to this incident the Appellant was verbally warned about playing solitaire while on company

time.

The Appellant admits to making the statements but claims he was trying to calm Mr. Hager down. I do not find this statement to be credible. The Appellant admits he went to Mr. Hager's office and entered into a heated confrontation with him. Based on the above this appeal is denied.

Daneil J. O'Neil,
Commissioner
"ss_____"

By vote of the Civil Service Commission (O'Neal,Harrington, Henderson and Tierney, Commissioner) on April 17,2003

A true record. Attest:
"ss_____"

Either party may file a motion for reconsideration within ten days of receipt of a Commission order or Decision. A motion for reconsideration shall be Deemed a motion for rehearing in accordance With M.G.L.ch 30A p 14(1) for the purpose of tolling the time for appeal.

Maria C. Naples, RN, CS
2 Enon Street 2d Fl.
Beverly,Mass. 01913
January 22,2001

Mr.Patrick Hager, Supervisor
Banking and Insurance Division
Commonwealth of Massachusetts
Department of Revenue
200 Arlington St.
Chelsea, MA 02150

Dear Mr.Hager,

I am writing at the request of my client Mr Sydney Rose whom I have seen for psychopharmacological Treatment since August 1999.

Job stressors such as the Fall 1999 job suspension, his demotion from the position of Field Auditor to that of Desk Auditor and the consequent loss of pay has made Mr. Rose's work stressful for him. These stressors coupled with the recent workplace incident ,in which he invoked the fear associated with the Wakefield tragedy lead

me to the conclusion that Mr. Rose can benefit from a leave of absence the length of which is mutually agreed upon between the two of you.

You should know that Mr. Rose denies any iIntent what-so-ever of hurting anyone at or outside of the work environment. He is willing to have a three month work period that includes an evaluation at the end of that time.

I hope this letter facilitates your negotiations with Mr. Rose.

Sincerely

Maria C. Naples, RN,CS

"ss_____"

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

SYDNEY A. ROSE
Plaintiff

v. CIVIL ACTION NO. 01CV 11985RGS

FREDERICK LASKEY, AS COMMISSIONER
OF REVENUE,COMMONWEALTH OF
MASSACHUSETTS

Defendant

AMENDED COMPLAINT

1. PLAINTIFF; SYDNEY A. ROSE

93 WITCHTROT RD

SANBORNVILLE, NH

2. DEFENDANT: FREDERICK A. LASKEY

COMMISSIONER OF REVENUE

OF THE COMMONWEALTH OF

MASSACHUSETTS

51 SLEEPER STREET

BOSTON,MA 02114

3. JUSIDICTION: AS PREVIOUSLY

SUBMITTED

4. CLAIM AGAINST DEFENDANT:

Termination of employment of plaintiff by Frederick A. Laskey, Commissioner of Revenue, Department of Revenue, Commonwealth of Massachusetts. Plaintiff has qualified disability under Title I of the Americans With Disabilities Act (ADA), to wit, mental impairment, depression, anxiety and stress. Cite: EEOC enforcement guidelines (3-25-97) p. 3 and 29, and C.F.R p 1630 2h(2) (1996). Failure to make reasonable accommodation Cite: EEOC enforcement guidelines pp20-21, this includes failure to grant sick leave. (EEOC enforcement guidelines pg.26), Failure to apply the "Direct Threat " standards uniformly or at all. (EEOC enforcement guidelines PP 35-37.

Employer must grant a leave of absence as a reasonable accommodation. (EEOC guidelines Pg. 33) Plaintiff requested medical leave of absence before termination, one or two days were given and then no more.

5. Plaintiff contends that a "threat" was not made; what was perceived as a threat was overheard by another supervisor who then filed a complaint. Plaintiff believes that his supervisor did not see himself in a threatening situation.

6. Plaintiff contends that the supervisor knew of Plaintiff's disability, this was communicated verbally to supervisor on three occasions. Cite: 42 U.S.C. 12112, sec. 102) and therefore dscrimination occurred.

RELIEF BEING SOUGHT:

The issue here now, is whether prospective

injunctive relief, that is to say, job reinstatement, can be secured under *Ex Parte Young,* 209 US 123 (1908). Under this case the federal courts "enjoin state officials to conform their conduct to requirements of federal law." *(Milliken v. Bradley,* 433 U.S. 267 *at pg.289),("nothwith-standing a direct and substantial impact On the state treasury.)* In the case of *Green v. Mansour,* 474 U.S. 64 at pg.68 citing *Young,* " the Eleventh Amendment does not prevent federal courts from granting prospective injunctive relief to prevent a continuing violation of federal law." In another case, *Puerto Rico Aqueduct & Sewer Authority v. Metcalf & Eddy,Inc.,* 506 US 139 (1993) at pg. 146, it is stated that, " The doctrine of *Ex Parte Young,* which ensures that state officials do not employ the Eleventh Amendment as a means of

avoiding compliance with federal law, is regarded as carving out a necessary exception to Eleventh Amendment immunity." This appears to be the exact situation here. The state of Massachusetts has argued that it is immune under the Eleventh Amendment, and therefore disabled persons who might want to use the Federal courts for relief are very limited in the types of relief sought. The state *official* must be the one sued, not the state. This amended complaint reflects this theory.

In the case of *Ex Parte Young,* 209 US 123 (1908) at 141, " the Eleventh Amendment should not be given a construction which would tend to impair the full efficacy of protecting clauses of the Fourteenth Amendment" The Fourteenth Amendment refers to depriving

a person of life, liberty or property without the due process of law. Plaintiff contends that this is the situation in this case. The "Equal Protection of the Law" part of the Fourteenth Amendment would also seem to apply here. If persons employed in the private sector ,or even counties can sue in federal court under the A.D.A. and *state employees* can not sue, then it seems that there is not "equal protection under the law." Plaintiff also contends that since Constitutional issues are raised here in a Federal Court then this federal court has the right to decide those issues, to the exclusion of all other courts. *Ex Parte Young, at 160.*

Defendant may argue that job reinstatement is a form of monetary relief and therefore a drain on the state treasury, (*Edelman v.*

Jordan, 415 U.S. 651, (1974) at 664-665 but plaintiff may argue that services are being given in exchange for money, and there is no actual drain on the state treasury.

In a dissenting opinion (*Green v. Mansour 474 U.S. 64 (1985) at 78,79)* Justice Brennan states; " because the disputes in the instant case are between citizens and their own state and because a federal question is the source of federal court jurisdiction, the Eleventh Amendment, properly construed, is no bar to petitioner's suits."

Plaintiff therefore asks for equitable relief citing *Milliken v. Bradley,* 433 U.S. 267 (1976) at 288 Where it is stated, *" equity has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public*

and private needs."

Plaintiff would also like this court to note that in this case on the monetary and retroactive side (suit) has been filed with the Superior Court of Massachusetts, docket no. 02-4697-F on October 18th,2002 as an appeal from an M.C.A.D. decision.

Date: October 28,2002

Signature "ss_____"

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